88-1944

Supreme Court, U.S.
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CASE NUMBER: _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HAMID ARZANIPOUR,
Petitioner

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) The agency failed to provide personal service (e.g. via certified mail) of a hearing at which the alien was tried *in absentia* and ordered deported even though personal service is required by regulation. Your Petitioner has steadfastly maintained that he never received this notice. This order of deportation is the source of all of your Petitioner's grief. Petitioner advanced this argument in his brief to the Circuit Court of Appeals for the Fifth Circuit and it should have been considered. This requirement is grounded firmly in the U.S. Constitution, the statutes and regulations. Yet, the United States Court of Appeals for the Fifth Circuit did not address this issue in its opinion. Should this case, therefore, be remanded to the court below for consideration of this issue?

2) Federal regulations require that an Immigration Judge give notice to the alien of the right to appeal to the B.I.A. at the time of his decision. No such notice was given in this case. The failure of the Immigration Judge to give the required notice (which reasonably should have included the place for filing the appeal and the time limit) led to the alien filing his appeal close to or past the deadline prescribed by regulation. Does the failure of the Immigration Judge to so inform the alien of his appeal rights constitute a denial of Due Process of Law, even though there is no specific statutory requirement that the regulation be adopted?

3) Your Petitioner was found deportable and ordered deported at a hearing for which he received no notice. The INS failed to follow its own regulations to send the notice by certified mail. There is no evidence that the notice was ever sent. After your Petitioner was ar-

rested, he filed a Motion to Re-open his case and filed an Application for Asylum in conjunction with the Motion to Re-open which we believe was non-frivolous and which established prima facie eligibility for the relief sought. Did the Immigration Judge abuse his discretion by denying the Motion to Re-open under the new test of *INS v. Abudu*, 108 S. Ct. 1102 which likened the test for the consideration of a Motion to Re-open to a Motion for a New Trial in a criminal case? This issue was not addressed at all by the court below.

4) The issue of abuse of discretion on the part of the Immigration Judge in refusing to re-open the hearing was raised and argued by your Petitioner. This issue was not addressed in the opinion of the court below. Should the case be remanded to said court for a ruling on this issue?

5) Does the Board of Immigration Appeals (B.I.A.) have the authority to *summarily* dismiss an appeal as untimely pursuant to regulations which give it the authority to dismiss appeals as "frivolous" and which confer on it "such discretion and authority as is appropriate and necessary for the disposition of the case", in the absence of any specific authority to *summarily* dismiss an appeal as untimely?

6) There was no finding of fact by the Court of Appeals for the Fifth Circuit that the appeal was not filed timely. The Board of Immigration Appeals had made no fact-finding endeavor to determine this question. In fact, the appeal was docketed, briefs were invited (see Appendix). The appeal remained under consideration by the Board of Immigration Appeals for four months before it was summarily dismissed as "untimely". Did this

action of the B.I.A. constitute official misleading as in the case of *Matter of Estate of Butler's Tire & Battery Co., Inc.*, 592 F.2d 1028 (9th Cir. 1979) (bankruptcy court calendared hearing on creditor's motion for request for extension of time to file an appeal after time for appeal had run.) Should this case be remanded to the lower court for such a finding of fact?

7) The United States Court of Appeals for the Fifth Circuit held that since there was no *affirmative conduct* which misled the alien as to the proper time to file his appeal, the appeal would not be deemed as having been filed timely. Is affirmative conduct to mislead required before reversible error can be found and an appeal deemed to have been filed timely or is an act of omission sufficient?

8) The Court of Appeals for the Fifth Circuit stated that "(i)n June 1987 the government sent a notice to the petitioner to appear for a hearing on June 25, 1987. This notice was sent to the petitioner's brother's address in Houston, Texas." The decision went on to cite a second notice that was allegedly sent. There was no evidence in the record that either notice was sent—not even a copy of the alleged first notice. Was this a violation of the statute which requires that the Court's decision be made "on the record"? 8 U.S.C. 1105a(a)(4).

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STATEMENT OF JURISDICTION

The date of the judgment sought to be reviewed was January 25, 1989.

A Motion for Re-Hearing Before the Panel was filed on February 10, 1989—one day past the deadline set by the rules of the court.

A Motion for Leave to File Late was immediately filed and was granted.

The Motion for Re-Hearing was denied on March 7, 1989.

On March 17, 1989, the Mandate was issued.

On March 29, 1989, Petitioner filed a Motion for Re-Call of the Mandate.

On April 24, 1989, the Motion for Re-Call of the Mandate was denied.

28 U.S.C. 2101(c) sets the time limit for filing Petitions for Writs of Certiorari at ninety (90) days after the judgment. However, Rule 20.4 provides that the time runs from the date of the denial of rehearing which was March 7, 1989.

Therefore, the deadline for filing of the Petition for Writ of Certiorari is June 5, 1989.

The statutory provision that confers on this court the jurisdiction to review this case by Writ of Certiorari is 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

AMENDMENT 5—CONSTITUTION OF THE UNITED STATES OF AMERICA

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

8 U.S.C. 1105a(a)(4)

"(4) except as provided in clause (B) of paragraph (5) of this subsection, the petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive;"

8 U.S.C. 1252(b)

"(b) Proceedings to determine deportability; removal expenses. A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney

General, shall make determinations, including orders of deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present, unless by reason of the alien's mental incompetency it is impracticable for him to be present, in which case the Attorney General shall prescribe necessary and proper safeguards for the rights and privileges of such alien. If any alien has been given a reasonable opportunity to be present at a proceeding under this section, and without reasonable cause fails or refuses to attend or remain in attendance at such proceeding, the special inquiry officer may proceed to a determination in like manner as if the alien were present. In any case or class of cases in which the Attorney General believes that such procedure would be of aid in making a determination, he may require specifically or by regulation that an additional immigration officer shall be assigned to present the evidence on behalf of the United States and in such case such additional immigration officer shall have authority to present evidence, and to interrogate, examine and cross-examine the alien or other witnesses in the proceedings. Nothing in the preceding sentence shall be construed to diminish the authority conferred upon the special inquiry officer conducting such proceedings. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that—

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section. In any case in which an alien is ordered deported from the United States under the provisions of this Act, or of any other law or treaty, the decision of the Attorney General shall be final. In the discretion of the Attorney General, and under such regulations as he may prescribe, deportation proceedings, including issuance of a warrant of arrest, and a finding of deportability under this section need not be required in the case of any alien who admits to belonging to a class of aliens who are deportable under section 241 if such alien voluntarily departs from the United States at his own expense, or is removed at Government expense as hereinafter authorized, unless the Attorney General has reason to believe that such alien is deportable under paragraphs (4), (5), (6), (11), (12), (14), (15), (16),

(17), (18), or (19) of section 241(a). If any alien who is authorized to depart voluntarily under the preceding sentence is financially unable to depart at his own expense and the Attorney General deems his removal to be in the best interest of the United States, the expense of such removal may be paid from the appropriation for the enforcement of this Act."

8 C.F.R. 3.1(d)(1-a)

"(1-a) Summary dismissal of appeals. The Board may summarily dismiss any appeal in any case in which (i) the party concerned fails to specify the reasons for his appeal on Form I-290A (Notice of Appeal); (ii) the only reason specified by the party concerned for his appeal involves a finding of fact or a conclusion of law which was conceded by him at the deportation or exclusion hearing; (iii) the appeal is from an order that granted the party concerned the relief which he requested, or (iv) the Board is satisfied, from a review of the record, that the appeal is frivolous or filed solely for the purpose of delay."

8 C.F.R. 3.1(d)

"(d) Powers of the Board—(1) Generally. Subject to any specific limitation prescribed by this chapter, in considering and determining cases before it as provided in this part the Board shall exercise such discretion and authority conferred upon the Attorney General by law as is appropriate and necessary for the disposition of the case."

8 C.F.R. 3.3

"Notice of Appeal. (a) A party affected by a decision who is entitled under this chapter to appeal to the Board

shall be given notice of his right to appeal. An appeal shall be taken by filing Notice of Appeal, Form I-290A, in triplicate, with the officer of the Service having jurisdiction over the case, within the time specified in the governing sections of this chapter. The Commissioner or any other duly authorized officer of the Service, or the Board, in his or its own discretion, for good cause shown, may extend the time within which to submit a brief in support of such appeal. The certification of a case as provided in this part shall not relieve the party affected from compliance with the provisions of this section in the event that he is entitled, and desires, to appeal from an initial decision, nor shall it serve to extend the time specified in the applicable parts of this chapter for the taking of an appeal. Departure from the United States of a person under deportation proceedings prior to the taking of an appeal from a decision in his case shall constitute a waiver of his right to appeal."

8 C.F.R. 3.36(b)

"(b) The notice of appeal of the decision shall be filed with the Office of the Immigration Judge having administrative control over the Record of the Proceeding within ten (10) calendar days after service of the decision. Time will be 13 days if mailed. If the final date for filing falls on a Saturday, Sunday, or legal holiday, this appeal time shall be extended to the next business day."

8 C.F.R. 103.5a(2)

"(2) Personal service. Personal service, which shall be performed by a Government employee, consists of any of the following, without priority or preference:

(i) Delivery of a copy personally;

(ii) Delivery of a copy at a person's dwelling house or usual place of abode by leaving it with some person of suitable age and discretion;

(iii) Delivery of a copy at the office of an attorney or other person, including a corporation, by leaving it with a person in charge;

(iv) Mailing a copy by certified or registered mail, return receipt requested, addressed to a person at his last known address."

8 C.F.R. 242.1(c)

"(c) Service. Service of the order to show cause may be accomplished either by personal service or by routine service; however, when routine service is used and the respondent does not appear for hearing or acknowledge in writing that he has received the order to show cause, it shall be reserved by personal service. When personal delivery of an order to show cause is made by an immigration officer, the contents of the order to show cause shall be explained and the respondent shall be advised that any statement he makes may be used against him. He shall also be advised of his right to representation by counsel of his own choice at no expense to the Government. He shall also be advised of the availability of free legal service programs qualified under Part 292a of this chapter and organizations recognized pursuant to section 292.2 of this chapter, located in the district where his deportation hearing will be held. He shall be furnished with a list of such programs, and a copy of Form I-618, Written Notice of Appeal Rights, regardless of the manner in which the service of the order to show cause was accomplished. Service of these documents shall be noted on Form I-213."

STATEMENT OF THE CASE

On August 24, 1986, the Petitioner was arrested and charged with entering the United States without inspection. He was given a *pro forma* "Order to Show Cause and Notice of Hearing" at "a time and a place to be set" (Form I-221) (Appendix, p. 34a). He gave the address of his brother in Houston, Texas, where he intended to reside and did, in fact, reside for almost a year.

The government alleges that a notice was sent to Mr. Arzanipour at that address on June 4, 1987—almost a year later—to appear at a June 25, 1987 hearing. Mr. Arzanipour did not appear. No copy of this alleged notice appears in the administrative record furnished by the government to the court below.

The government further alleges that another notice was sent to that address on July 1, 1987 to appear at a hearing scheduled on August 10, 1987 (Appendix, p. 54a). Note that the notice makes no mention of the alleged previous notice, fails to warn Mr. Arzanipour of the consequences of a failure to appear, shows no date of mailing and was apparently not sent by certified mail. Mr. Arzanipour did not appear.

A hearing was held *in absentia* by the Immigration Judge on August 10, 1987 at which time the judge found Mr. Arzanipour deportable and ordered him deported.

In the meantime, Mr. Arzanipour had married a United States citizen, Cynthia Ann Pedroza, in Houston, Texas on June 30, 1987. Ironically, on the very day that the Immigration Judge—unbeknown to Mr. Arzanipour—was conducting a hearing *in absentia* in Buffalo, New York, Mr. Arzanipour and his U.S. citizen wife were in the Houston, Texas office of the Immigration & Natu-

ralization Service filing a form known as an "I-130" to classify Mr. Arzanipour as the immediate relative of a U.S. citizen for immigration purposes.

On November 17, 1987, Mr. & Mrs. Arzanipour went to the Houston, Texas office of INS to check on the status of the petition and to obtain work authorization for Mr. Arzanipour. He had been to this office at least twice before to check on the status of his wife's petition. He had been told that it was pending. Mr. Arzanipour was arrested at that time due to the outstanding order of deportation and remained incarcerated for 14 months.

Mrs. Arzanipour contacted me and, on December 16, 1987, I filed a Motion to Reopen the hearing at which her husband was tried *in absentia* and I simultaneously filed a Motion for Change of Venue. Mr. Arzanipour is married to a U.S. citizen in a bona fide marriage. However, due to recent amendments to the Immigration & Nationality Act, he is not eligible for adjustment of status since he was married after he came under deportation proceedings.[1] In addition, Mr. Arzanipour has a far from frivolous claim for political asylum.[2] He would also be eligible to apply for other discretionary relief—such as voluntary departure—at a proper hearing. In my brief, I asserted all of these points. Yet, the Immigration Judge denied the Motion to Re-Open and the Motion for Change of Venue.

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1. He must follow another procedure to obtain permanent residence status. This bar to adjustment of status merely because one has come under deportation proceedings is of highly questionable constitutional validity; but, it would be premature to challenge this statute here.

2. A copy of his application for political asylum is in the record. Also, please see "Brief in Support of Appeal of Decision of Immigration Judge Denying Motion To Re-Open" (Appendix, p. 46a).

During the pendency of his appeal, the INS attempted to deport Mr. Arzanipour without notice to me, the undersigned, contrary to regulations. I had to file a Habeas Corpus petition in Federal District Court (CA H-88-0158) to forestall deportation.

The District Director of the Houston District INS refused to set bond for Mr. Arzanipour. Mr. Arzanipour remained incarcerated from November 17, 1987 until January of 1989 when he was ordered released on a $25,000 personal recognizance bond after a Habeas Corpus hearing before a Federal Magistrate in the Southern District of Texas. He is charged with no crime.

The Immigration Judge's decision was dated March 1, 1988. There was no indication as to when it was mailed. There was no notice of a right of appeal or the place to file an appeal contained in the decision or appended to it. There was only the decision. Therefore, I had to research and make numerous telephone calls to determine the rights of my client, the proper office to file the appeal and the filing fee. Neither I, nor my client, was ever given notice of a time limit for filing the appeal. I sent the appeal with the filing fee by UPS on March 22, 1988. The time for appeal runs from the time of service. Service is complete with mailing. But, there is no indication in the record as to when the decision was mailed. There is nothing in the record similar to a Certificate of Service. So, who can say for sure when the time for appeal began to run—or expired? Yet, no fact-finding was made by the B.I.A. or by the court below in this regard. The issue, although raised, was ignored.

I called the Docket Clerk at the BIA on May 17, 1988, since I had not heard anything concerning the

appeal. I was told that there was nothing on file. I then contacted UPS and sent my proof that the appeal had, in fact, been received by INS on March 23, 1988. I also sent a copy of the entire file. The government has since acknowledged that the appeal was, in fact, received on that date. (See the BIA decision which is in the Appendix at p. 8a).

On August 3, 1988, my office received a frantic telephone call from Cynthia Arzanipour, the wife of the Petitioner. I was on vacation in China at that time. She had called the BIA herself and was told that the appeal had been dismissed. One of my associates met with Mrs. Arzanipour on Friday, August 5, 1988. He confirmed by telephone that the appeal had, in fact, been dismissed on July 28, 1988 and assured her that I would look into the matter as soon as I returned. About an hour later, my office received a frantic telephone call from both Mr. & Mrs. Arzanipour (conference call). He had been told by an immigration officer to gather his things because he was being deported. My law associate, Mr. Steinberg, then spent frantic hours contacting the Federal District Court where the Habeas was pending, the U.S. Attorney handling it, and the Clerk of the Court of Appeals for the Fifth Circuit. He then filed the Petition for Review. My office did not receive a copy of the BIA decision until the following Monday.

I have recited the facts in this statement to show that the government has acted arbitrarily and capriciously, failed to follow their own rules, abused discretion and denied Mr. Arzanipour his right to Due Process at every stage of this ordeal.

The government has put Mr. Arzanipour on the "INS Railroad" and has done everything to prevent or discourage Mr. Arzanipour from pursuing his claim to political asylum in the United States and for other discretionary relief (e.g. voluntary departure) to which he might be entitled, up to and including jailing him during this entire process.

The United States Court of Appeals for the Fifth Circuit rendered a decision on January 25, 1989 affirming the decision of the Board of Immigration Appeals (Appendix, p. 1a). Numerous issues raised in this case before the court were not addressed at all in the decision. Nor was any reason given for not addressing them. These matters are addressed in the QUESTIONS PRESENTED FOR REVIEW above; so, I will not address them here.

A MOTION FOR RE-HEARING BEFORE THE PANEL was filed with the court and was denied on March 7, 1989 (Appendix, p. 23a). The Mandate was issued on March 17, 1989. A MOTION FOR RECALL OF MANDATE was filed on March 29, 1989. It was denied on April 24, 1989 (Appendix, p. 26a).

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The court of first instance was the United States Court of Appeals for the Fifth Circuit. The basis for its jurisdiction was 8 U.S.C. 1105a(a) which confers exclusive jurisdiction for appeals from decisions of the Board of Immigration Appeals regarding deportation matters on the Circuit Courts of Appeals.

Venue was set forth in 8 U.S.C. 1105a(a)(5) since the Petitioner's residence was Houston, Texas, a place within the jurisdiction of the United States Court of Appeals for the Fifth Circuit.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

It has never been seriously denied that federal regulations have "the force and effect of law". Cf. *Accardi v. Shaughnessy*, 347 U.S. 260 at 265 (1954).

This Honorable Court has held in a series of cases that even gratuitous regulations—not required by statutes or by the U.S. Constitution—are nonetheless binding on the regulators. *Service v. Dulles*, 354 U.S. 363 at 388 (1957); *Vitarelli v. Seaton*, 359 U.S. at 539-40 (1959); *Accardi v. Shaughnessy*, 347 U.S. 260 at 267 (1954); *Bridges v. Wixon*, 326 U.S. 135 at 153 (1945); *U.S. v. MacDaniel*, 32 U.S. (7 Pet.) 1 at 15 (1833). These cases declare unambiguously that administrators are bound by their regulations.

However, this simple rule has been challenged continuously by some party begging the court to forgive an infraction of the regulations. Cf. *McKenna v. Seaton*, 259 F.2d 780 (D.C. Cir. 1958); *Tucker v. Alexander*, 275 U.S. 228 at 231 (1927); *U.S. v. Memphis Cotton Oil Co.*, 288 U.S. 62 (1933); *U.S. v. Henry Prentis & Co.*, 288 U.S. 73 (1933); *U.S. v. Factors & Finance Co.*, 288 U.S. 89 (1933); *U.S. v. Andrews*, 302 U.S. 517 (1938); *Public Service Commission of New York v. FPC*, 295 F.2d 140 (D.C. Cir. 1961); *U.S. v. Caceres*, 440 U.S. 741 (1979).

In short, the more exceptions that are carved out for the rule, the more litigation will be inspired and the more the courts will be hounded and overburdened with pleas for a "judicial waiver" of the simple rule that administrators should follow their own rules. The rule for administrators—as it is with the public they are supposed to serve—should be simply to "Obey the Law!".[3]

Administrators certainly require the public to follow their rules. Courts require parties to litigation to follow the rules of the courts. Courts, Administrators and the public are required to obey the Constitution of the United States, uphold the law, and to follow rules and regulations which have the force and effect of law. In many instances, persons subscribe to oaths to do just that.

Notice is fundamental to Due Process. The statutes enacted by the Congress and the regulations promulgated by the Executive branch in regard to questions related to immigration matters have taken due note of this fact and have provided for proper procedure, including notice, to persons affected by these laws.

The problem arises when employees of the INS or the Executive Office for Immigration Review, in the blinding heat of constant exercise of their authority, lose sight of the rights of those persons caught up in the system.

The Immigration Judge did not follow his own agency's rules for giving proper notice to Mr. Arzanipour.

The same judge abused his discretion by not re-opening the hearing even though Mr. Arzanipour met the test of a

3. For an excellent discussion of this topic, please see Berger, Raoul, "Do Regulations Really Bind Regulators?", Northwestern University Law Review, Vol. 62, No. 2 (1967).

prima facie case of eligibility enunciated by *Abudu v. INS*, 802 F.2d 1096 at 1100 (9th Cir. 1986). Even the stricter test set forth by this Honorable Court when this same case came before it in *INS v. Abudu*, 108 S. Ct. 1102 (1988) was met since his case met any reasonable standard for a new trial in a criminal case. He received no notice of the hearing at which he was found deportable and ordered deported in *in absentia*. Certainly, in a criminal case, a new trial would be granted to a person who was convicted *in absentia* at a trial for which he had no notice and thus no opportunity to appear to defend himself. Mr. Arzanipour has steadfastly maintained that he did not receive notice of the hearing.

The law requires that he shall have "reasonable opportunity to be present". 8 U.S.C. 1252(b). *INS v. Lopez-Mendoza*, 104 S. Ct. 3479 (1984). The law also requires that "the alien shall be given notice, reasonable under all the circumstances, of the charges against him and of the time and place at which the proceedings will be held." 8 U.S.C. 1252(b)(1). The regulations of the INS provide that routine service (ordinary mail) may be made of the Order to Show Cause. They further provide that

> "when routine service is used and the respondent does not appear for hearing or acknowledge in writing that he has received the order to show cause, it shall be reserved by personal service." 8 C.F.R. 242.1(c).

As defined in 8 C.F.R. 103.5a(2), the personal service requirement may be satisfied by merely sending the notice by certified mail, return receipt requested, as is so common a practice in courts throughout the land. Although the original Order to Show Cause was served by personal

service, it is insufficient to satisfy the notice requirement since it contains no time, date or place for the hearing (Appendix, p. 34a). There is no evidence, not even an assertion, anywhere in the record that this requirement, contained in their own regulations, for personal service was met by INS.

The Immigration Judge further disregarded INS regulations by failing to notify Mr. Arzanipour or his attorney, the undersigned, of the right to appeal, the place to file the appeal and any time limits on filing the appeal. There is no mention of it in his decision or any attachment thereto, which is a part of the Administrative Record. Such notice is required by 8 C.F.R. 3.3(a). This is a material right the withholding of which has been held to be a denial of due process of law. *Fragale v. Rogers,* 175 F.Supp. 658 (E.D. N.Y. 1959).

The BIA exceeded its authority by summarily dismissing the appeal of the Immigration Judge's decision. It had no authority to do so. The grounds on which the BIA may summarily dismiss appeals are set forth at 8 C.F.R. 3.1(d)(1-a). There is no mention of untimeliness as grounds for summary dismissal. This is not mere oversight since it is obvious that a hearing would be required to determine whether notice of the right to appeal, place to appeal and time limitations were properly given and whether the decision was received in time for an appeal and whether the appellant was misled by the Immigration Judge as to the time within which to file an appeal. If an Immigration Judge has misled an appellant as to the time in which to file an appeal, then a late notice may be deemed to have been constructively filed within the jurisdictional time limits. *Hernandez-Rivera v. Immigration & Naturalization Service,* 630 F.2d 1352 (9th Cir. 1980),

disagreed with on other grounds. *Dastmalchi v. Immigration & Naturalization Service,* 660 F.2d 880 (3rd Cir. 1981). On this authority alone, Mr. Arzanipour's appeal should be declared as having been constructively filed timely since the Immigration Judge told neither him nor his attorney, the undersigned, anything about a right to appeal, thus misleading him by this gross omission. It is interesting to note that the attorney for the government in his "Government's Brief in Support of the Decision of the Immigration Judge", dated July 6, 1988 (Appendix, p. 40a), did not raise the issue of "untimeliness" in regard to the appeal.

Furthermore, the court below failed to address substantial questions raised in this case as pointed out in the QUESTIONS PRESENTED FOR REVIEW section.

The court below seeks to add yet another exception to the rule of this court that agencies are bound by their own regulations—that the rule must be required by the U.S. Constitution or by statute.

The court below seeks to establish a new rule that an act of omission cannot constitute "official misleading" and thus find that the appeal in this case was filed timely. However, the U.S. Supreme Court has ruled that an Immigration Judge's failure to adequately explain an alien's rights to him can constitute a denial of due process of law. *United States v. Jose Mendoza-Lopez and Angel Landeros-Quinones,* 481 U.S. ____ (1987).

Guidance is needed in the application of the new standard for consideration of a Motion to Re-open enunciated by this Honorable Court in *INS v. Abudu,* 108 S. Ct. 1102 (1988).

Therefore, this Honorable Court should hear this case pursuant to Rule 17.1(a) and 17.1(c) in that the decision and opinion of the United States Court of Appeals for the Fifth Circuit departs from the usual course of judicial proceedings since several substantial questions raised by the Petitioner were ignored. Further, said decision and opinion are in conflict with the long-standing decisions of this Honorable Court in regard to the duty of administrators to follow their own regulations. Finally, the lower courts seek to establish judicial precedent in important questions of federal law which this Honorable Court has not, but should, settle in regard to whether an act of omission can constitute "official misleading" so as to cause a filing of an appeal to be deemed "timely".

PRAYER

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that this Honorable Court grant his PETITION FOR A WRIT OF CERTIORARI and all other relief that he might be entitled to in law or in equity. At every turn, your Petitioner has been robbed of his right to notice and a fair hearing of his application for asylum and other discretionary relief to which he might be found entitled at a fair hearing. He has not had his "day in court". We do not ask that this Honorable Court grant him the immigration benefits which he seeks—only the opportunity to have a fair opportunity to present his case. We pray that this Honorable Court will grant him that measure of justice.

Respectfully submitted,

PRAPPAS & DARLOW, P.C.

By: _____

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Attorneys for Petitioner

CERTIFICATE OF SERVICE

This is to certify that three (3) true copies of the foregoing PETITION FOR WRIT OF CERTIORARI and Appendix were served upon:

Solicitor General
Department of Justice
Washington, D.C. 20530

and

Commissioner of Immigration
U.S. Immigration & Naturalization Service
425 I Street N.W.
Washington, D.C. 20536

by depositing them in a United States post office or mailbox, with first class postage prepaid, addressed as above.

Done on this 1ST day of June, 1989.

GEORGE J. TRAPPAS
Attorney for Petitioner

APPENDIX

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APPENDIX I

Hamid ARZANIPOUR,
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

No. 88-4565

Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Jan. 25, 1989.

Alien petitioned for review of order of the Immigration and Naturalization Service dismissing his appeal of deportation order. The Court of Appeals, Gee, Circuit Judge, held that: (1) Board of Immigration Appeals has regulatory authority to summarily dismiss appeal as untimely; (2) Code of Federal Regulations clearly set forth time deadlines for filing appeals to BIA; (3) absent affirmative conduct by which alien was misled as to proper time limits within which to file appeal to BIA, appeal would not be deemed timely filed; and (4) immigration judge's failure to notify alien of his appeal rights, as required by agency regulation, did not violate alien's constitutional due process rights.

Affirmed.

Petition for Review of an Order of the Immigration and Naturalization Service.

Before GEE, WILLIAMS, and HIGGINBOTHAM, Circuit Judges.

GEE, Circuit Judge:

In August 1986 the petitioner was arrested and charged with entering the United States without inspection. At that time the petitioner was given notice that he would be required to appear for a hearing at "a time and place to be set." In June 1987 the government sent a notice to the petitioner to appear for a hearing on June 25, 1987. This notice was sent to the petitioner's brother's address in Houston, Texas. This was the address given by the petitioner at the time of his arrest as his intended residence. The petitioner failed to appear at the hearing. The government sent a second notice to the petitioner in July 1987, instructing him to appear at a hearing on August 10, 1987. This notice was also sent to the petitioner's brother's address. The petitioner again failed to appear at the hearing.

On August 10, 1987, the Immigration Judge held a hearing in absentia and ordered the petitioner deported. In December 1987 the petitioner filed a motion to reopen the hearing and a motion for change of venue. In a written opinion dated March 1, 1988, the Immigration Judge denied the petitioner's application to reopen the case. The petitioner sent a notice of appeal on March 22, 1988. The petitioner was given until June 27, 1988 to submit a brief in support of his appeal. On July 28, 1988, the BIA summarily dismissed the petitioner's appeal as untimely.

The petitioner contends that the Board of Immigration Appeals (BIA) erred in summarily dismissing his appeal. The basis for the petitioner's contention is three-fold. First, he argues that the BIA lacks statutory or regulatory authority to summarily dismiss an appeal on the grounds of untimely filing. Second, he argues that the Code of Federal Regulations does not set out specific time limits within which appeals to the BIA must be filed and therefore the BIA's decision is void as baseless. Finally, he argues that the decision to dismiss the appeal as untimely is void because he was not notified of his right to appeal as required by regulation.

[1] The petitioner's argument that the BIA lacked the authority to dismiss the appeal as untimely is without merit. 8 C.F.R. § 3.1(1-a) authorizes the BIA to "dismiss any appeal in any case in which (i) the party concerned fails to specify the reason for his appeal, (ii) the only reason . . . for his appeal involves a finding of fact or conclusion of law which was conceded by him at the . . . hearing, (iii) the appeal is from an order which granted the party concerned the relief which he requested, or (iv) the board is satisfied, . . . , that the appeal is frivolous. . . ." According to the petitioner this subsection of 8 C.F.R. § 3.1 provides an exhaustive list of the types of cases which the BIA may summarily dismiss. The petitioner further argues that his appeal did not involve one of these types of cases and therefore should not have been summarily dismissed.

There are two flaws in the petitioner's argument. First, contrary to the petitioner's assertion, his case is one of the types of cases which may be dismissed under the authority of § 3.1(1-9). Subsection (iv) of this sec-

tion permits the BIA to summarily dismiss appeals which are frivolous. An appeal which has not been filed in a timely fashion and therefore cannot succeed can be considered to be a frivolous appeal. The BIA could have dismissed the petitioner's appeal under the authority of this subsection. Further, 8 C.F.R. § 3.1(d) confers on the board "such discretion and authority as is appropriate and necessary for the disposition of the case." The authority to dismiss untimely appeals is necessary for the disposition of such cases. Therefore even if the BIA did not have the authority to dismiss the appeal pursuant to 8 C.F.R. § 3.1(a-1), it clearly had the authority to dismiss the appeal pursuant to 8 C.F.R. § 3.1(d).

[2] The petitioner's argument that the C.F.R. does not provide specific deadlines for filing appeals with the BIA is similarly without merit. In its decision dismissing the petitioner's appeal the BIA cited the filing requirements of 8 C.F.R. §§ 3.3 and 3.36 as the source of the time requirements. Section 3.3(a) states, in relevant part "An appeal shall be taken by filing notice of appeal Form I-290A . . . within the time specified in the governing sections of this chapter." Section 3.36 states, in relevant part, "[T]he notice of appeal . . . shall be filed . . . within ten (10) calendar days after service of the decision. Time will be 13 days if mailed." These sections clearly set forth time deadlines for filing appeals. There is, therefore, no merit to the petitioner's argument that the BIA's decision to dismiss the appeal as untimely is void as baseless.

The petitioner's third argument is that the decision to dismiss his appeal as untimely is void because he was not notified of his right to appeal as required by regulation. This argument can be divided into two parts. First,

the petitioner contends that the appeal in this case should not be considered untimely because of the conduct of the Immigration Judge in failing to notify the petitioner of his right to appeal. In support of this argument the petitioner cites *Hernandez-Rivera v. Immigration & Naturalization,* 630 F.2d 1352 (9th Cir. 1980). In *Hernandez-Rivera,* the Ninth Circuit held that "where there has been official misleading as to the time within which to file a notice of appeal, the late notice may be deemed to have been constructively filed within the jurisdictional time limits." *Id.* at 1355 (citations omitted).

[3] The petitioner in this case argues that the Immigration Judge's failure to notify him of his right to appeal was official "misleading . . . by . . . gross-omission" such that, under the rule of *Hernandez-Rivera,* his appeal should be deemed to have been timely filed. In those cases in which the courts have deemed late filed appeals to have been constructively filed with the proper time limits due to official misleading as to time limits, the misleading has consisted of some affirmative conduct on the part of the judiciary. *See e.g. Hernandez-Rivera supra* (Immigration Judge professed to grant extension for appeal dispite the lack of authority to do so.); *Motteler v. J.A. Jones Construction Company,* 447 F.2d 954 (7th Cir. 1971) (district court erroneously extended time within which plaintiff could file motion to reconsider then dismissed motion as untimely after the time to appeal the initial judgment had run); and *Matter of Estate of Butler's Tire & Battery Co., Inc.,* 592 F.2d 1028 (9th Cir. 1979) (bankruptcy court calendared hearing on creditor's motion for request for extension of time to file an appeal after time for appeal had run.) In the present case the petitioner would have us hold that

official inaction can constitute the type of official misleading on which the *Hernandez-Rivera* rule is based. This we are unwilling to do. The rule of *Hernandez-Rivera* is and should be limited to those unique circumstances in which, by affirmative conduct, a petitioner is misled as to the proper time limits within which to file an appeal. No such affirmative conduct is present in this case. Therefore the petitioner's appeal should not be deemed timely filed on the basis of official misleading.

[4, 5] The petitioner also argues that the decision to dismiss his appeal as untimely is void because the Immigration Judge's failure to notify him of his appeal rights, as required by agency regulation, violated his constitutional due process rights. 8 C.F.R. § 3.3(a) states that "a person affected by a decision who is entitled to appeal . . . shall be given notice of his . . . right to appeal." Failure to adhere to regulations can constitute a denial of due process of law. *See Accardi v. Shaughnessy,* 347 U.S. 260, 74 S. Ct. 499, 98 L.Ed. 681 (1954) and *Bridges v. Wixon,* 326 U.S. 135, 65 S. Ct. 1443, 89 L.Ed. 2103 (1945). The failure of an agency to follow its own regulations is not, however, a per se denial of due process unless the regulation is required by the constitution or a statute.

[6] In this case the agency regulation is not required by statute. The petitioner alleges, however, that the notice required by 8 C.F.R. § 3.3 is "a material right the withholding of which has been held to be a denial of due process of law." In support of this allegation the petitioner cites *Fragale v. Rogers,* 175 F.Supp. 658 (E.D. N.Y. 1959). The petitioner's reliance on this case is misplaced. In *Fragale* the petitioner's right to notice of

her right to appeal was required by statute, not merely a regulation. In this case the requirement that the Immigration Judge inform the petitioner of his right to appeal is not required by a statute.

Further, the petitioner in fact learned of his right to appeal apparently before the time to appeal or request an extension within which to file an appeal had passed. The prejudice to the petitioner, therefore, resulted from his lack of knowledge regarding the time within which an appeal could be taken, not his lack of knowledge regarding his right to appeal. C.F.R. § 3.3(a) requires that the Immigration Judge inform a party of his right to appeal, not the time within which an appeal can be taken. Therefore, the Immigration Judge's failure to comply with this regulation did not result in substantial prejudice to the petitioner. Consequently the petitioner's due process rights were not violated by the Immigration Judge's failure to comply with this regulation.

The order of the BIA dismissing petitioner's appeal is AFFIRMED.

APPENDIX II

DECISION OF THE BOARD OF IMMIGRATION APPEALS

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

File: A27 685 673 — Boston

Date: July 28, 1988

In re: HAMID *ARZANIPOUR*

IN DEPORTATION PROCEEDINGS APPEAL

ON BEHALF OF RESPONDENT:

George J. Prappas, Esquire
Prappas & Darlow, P.C.
3120 Southwest Freeway, Suite 412
Houston, Texas 77098

ON BEHALF OF SERVICE:

Jimmie L. Benton
General Attorney

CHARGE:

Order: Sec. 241(a)(2), I&N Act [8 U.S.C. § 1251 (a)(2)] — Entered without inspection

APPLICATION:

Reopening

The record reflects that the immigration judge rendered his decision on March 1, 1988. The respondent's appeal, with the appropriate fee, was not received by the Office of the Immigration Judge until March 23, 1988.

Federal regulations require that an appeal be filed within 10 calendar days after service of the decision or within 13 days after the mailing of the immigration judge's decision. *See* 8 C.F.R. § 3.36. In order for the appeal to be timely, it must be recevied by the Office of the Immigration Judge with the appropriate fee within the time period set forth in 8 C.F.R. § 3.36. *See* 8 C.F.R. § 3.3. Therefore, we find that the appeal filed by the respondent is untimely and not properly before us. Accordingly, the appeal will be dismissed as untimely.

ORDER: The appeal is dismissed as untimely

/s/ MARY MARJORIE DUNNE
For the Board

APPENDIX III

UNITED STATES DEPARTMENT OF JUSTICE
Executive Office for Immigration Review
Office of Immigration Judge

Boston, Massachusetts

File: A27 685 673

IN DEPORTATION PROCEEDINGS

In The Matter Of:

ARZANIPOUR, HAMID
Respondent

Charge: Section 241(a)(2) of the Immigration and Nationality Act [8 USC 1251(a)(2)] — entered without inspeciton

Application: Motion To Reopen

In Behalf of Respondent:

George J. Prappas, Esq.
3120 S.W. Frwy., #412
Houston, TX 22098

In Behalf of Service:

Michaelangelo Rocco, Esq.
General Attorney
Buffalo, New York

The Respondent is a twenty-seven-year old married male alien, a native and citizen of Iran who entered the

United States on August 24, 1986, at Alburg Springs, Vermont, at which time he was not inspected by an Immigration Officer.

On August 24, 1986 the Respondent was arrested by Immigration Authorities, put under proceedings and was released on bond. At the time the Respondent was released on bond he was told that he would receive a notice of a hearing before an Immigration Judge. The Respondent at that time gave his address in the United States as follows: 9626 Dorita St., Houston, Texas 77038. On June 4, 1987 the Respondent was sent a notice to appear before an Immigration Judge on June 25, 1987 at Buffalo, New York. The notice of the hearing was the address stated above. The Respondent did not appear for a hearing before the Immigration Judge on June 25, 1987 as requested. A second notice was sent to the Respondent on July 1, 1987 to appear for a hearing before an Immigration Judge at Buffalo, New York on August 10, 1987. That notice was also sent to the Respondent at the address he gave at the time he was released from Custody. The Respondent failed to appear for a hearing on August 10, 1987. Neither of the notices sent to the Respondent to appear for a hearing on June 25, 1987 and August 10, 1987 were returned to the Immigration Court because they were not deliverable. On August 10, 1987, the undersigned conducted an In Absentia hearing finding the Respondent deportable as charged, denying him any discretionary relief and ordering him deported to Iran. On August 18, 1987, a copy of the undersigned's decision dated August 10, 1987 was sent to the Respondent at the address indicated above.

On December 16, 1987 a Motion to Reopen and Reconsider was filed by the Respondent's attorney. The

Motion to Reopen and Reconsider states that the Respondent entered the United States without inspection on August 24, 1986 at Alburg Springs, Vermont accompanied by his brother, Masoud, a lawful permanent resident of the United States; that the Respondent was released on his personal recognizance and was advised that he would be later notified of the time and place for him to appear at a hearing and gave his brother's address in Houston, Texas as his residence; that the Respondent on June 30, 1987 married a United States citizen, one Cynthia Ann Pedroza, and resided at 6301 Rampart #849, Houston, Texas; that on August 10, 1987 the Respondent's spouse filed a visa petition in his behalf at the Immigration office in Houston, Texas; that on November 17, 1987, while the Respondent and his wife were at the Immigration Office checking on the status of the visa petition, the Respondent was arrested and has been incarcerated up to the present time; that the Respondent had never received notice of the time, place or date for appearance at an Immigration hearing; that a default order of deportation was issued on August 18, 1987 on the charge of entering without inspection; that the Respondent was not given an opportunity to appear and present his eligibility for discretionary relief, namely, to file his application for political asylum and a request for voluntary departure through Toronto, Canada. Attached to the Respondent's Motion to Reopen are xeroxed copies of a Canadian driver's license, in the name of the Respondent, with an issuance date of August 19, 1986, an immigration card, in the name of the Respondent, a marriage license, in the name of the Respondent and his spouse, Cynthia Ann Pedroza, reflecting they were married on June 30, 1987 in Houston, Texas, and their address was 6201 Rampart #849, Houston,

Texas 77081, and an Immigration stamp showing that a visa petition was filed in behalf of the Respondent by his spouse on August 10, 1987 with the Immigration Service in Houston, Texas.

In support of the Respondent's Motion to Reopen, an affidavit of the Respondent's brother, Masoud Arzanipour, was submitted to the undersigned dated February 6, 1988, wherein the affiant states in pertinent part

> ". . . I do herein declare that I am the person who brought my brother, Hamid, into the United States at Alburg Springs, Vermont. I had visited my other brother in Ontario, Canada, and brought my brother with me to the United States because my parents were going to visit me from Iran. My brother, Hamid, had filed his application as a refugee seeking political asylum in Canada. He was given permission to live and work in Canada for over a year. He entered the country uninspected and was released without bond. He gave the Immigration officers my address in Houston, which at the time, August, 1986, was 9626 Dorita Street, Houston, Harris County, Texas 77038. My brother met his present wife, Cindy, and they were married on June 30, 1987. I and my daughter, as well as other friends, were in attendance at his wedding. My brother and sister-in-law moved from my home to their apartmnet at 6301 Rampart, #849 Houston, Harris County, Texas. Shortly thereafter, I also moved and placed a change of address with the U.S. Post Office in Houston, Texas (see attached exhibit "A" notifying sender of new address of addressee). My brother was arrested at the Immigration Office while checking on his status. I do herein declare that I, nor my brother Hamid Arzanipour, ever received any notice from the Immigration Office in connection with any hearing to be held in Buffalo, New York . . ."

Attached to the Motion to Reopen is a cover letter of Attorney Robert D. Kolken, Esq. of Buffalo, New York, and dated December 17, 1987 in the name of the Respondent which states in pertinent part

> ". . . the alien did not appear for the deportation hearing scheduled because he did not receive timely notice of said proceedings. Said notice was sent to his brother's address at 9626 Dorita Street, Houston, Texas 77038, with whom he was living at the time of the issuance of the Order to Show Cause. Unfortunately, his brother had moved prior to the time that the notices were sent. The United States Postal Service was notified of the new address, but apparently the same were not received until September, 1987. In the meantime, the alien married a United States citizen and changed his address to 6301 Rampart, #849 Houston, Texas. The Immigration and Naturalization Service was informed of this address at the time that his United States citizen wife submitted an I-130 petition on his behalf in August, 1987 . . .

The Respondent's attorney has submitted to the court a Motion for a Change of Venue of the Respondent's deportation proceedings which is undated but which states in pertinent part

> ". . . The Respondent has never received further notice to appear for a hearing in the deportation hearing for the reason that he had gotten married to Cynthia Ann Pedroza Arzanipour, a citizen of the United States, and on June 30, 1987, in Houston, Texas, and they established a residence at 6301 Rampart, #849, Houston, Texas . . ."

The Respondent, through Counsel, has submitted an asylum application dated February 6, 1988 reflecting his

present residence at 6200 Gulfton #21000 Houston, Texas 77081. The Respondent's asylum application is not accompanied by form G-325A which is required to be submitted by the Respondent pursuant to the regulations which, if submitted, would indicate the Respondent's addresses in the United States in addition to his present address and that he lived at the previous addresses.

The Service has submitted a brief in opposition to the Motion to Reopen concluding that the Respondent has failed to establish prima facie eligibility for the relief requested, namely, Political Asylum, Withholding of Deportation, Voluntary Departure in lieu of Deportation and that the Respondent's Deportation proceedings should not be reopened based on his contention that he failed to receive due notice.

I agree with the Service that the Motion to Reopen should be denied. The record in this case reflects that the Respondent was sent notices to appear on two different occasions before the undersigned and failed to do so. The Respondent's Motion to Reopen indicates that he moved from his brother's address to a new address after being married to a United States citizen. The Respondent's brother Masoud indicated in an affidavit that his brother moved from his residence to a new residence, he moved shortly thereafter and notified the U.S. Postal Service in Houston, Texas. Attached to the Respondent's brother's affidavit (Masoud Arzanipour) is a xeroxed copy of a notice sent to the affiant with a notation reflecting that as of 1-3-87 the affiant had moved to 6003 Rampart, #240C Houston, Texas 77081-3411. The Respondent's Motion to Reopen and affidavits in support thereof do not reflect exactly when the Respondent moved from 9626 Dorita Street in Houston, Texas to 6003

Rampart #240C in Houston, Texas. Although the record shows that as of 1-3-87 the Post Office was aware that the Respondent's brother, Masoud, had changed his address to 6003 Rampart #240C, Houston, Texas. The attorney's cover letter (Robert D. Kolken) dated December 17, 1987 reflects that the Respondent's brother moved from 9626 Dorita Street in Houston, Texas prior to the notices sent him to appear for hearings. The record does not reflect that the notices to the Respondent to appear for the hearings as indicated heretofore sent to his last known address 9626 Dorita Street, Houston, Texas were not forwarded to him at his brother's new address as reflected in the change of address to the Post Office by the Respondent's brother and as indicated in the attorney's letter dated December 17, 1987 of Mr. Robert D. Kolken, Esq.

The Respondent's Motion to Reopen does not contain a copy of the visa petition that the Respondent's wife submitted in his behalf to indicate where the Respondent's address was prior to his marriage to a United States citizen nor, as indicated previously, is there a G-325A attached to the Respondent's Political Asylum application reflecting, if submitted, where the Respondent was residing in the United States. Based on what is contained in the record, I find that the Respondent was sent notices to appear before the undersigned in Buffalo, New York on two separate occasions and those notices were never returned to the Court indicating that they could not be forwarded to the Respondent at the change of address, which, according to the record, reflects that the Respondent's brother changed addresses at least as of 1-3-87. It can only be assumed that the Respondent did receive those notices.

The Respondent seeks to reopen his deportation proceeding to apply for Political Asylum, Withholding of Deportation pursuant to Section 243(h) of the Immigration and Nationality Act as amended and Voluntary Departure in lieu of deportation. The Respondent's Political Asylum application reflects that he fears persecution, if he were to return to Iran, because he feels that he will be jailed for aiding a cousin to escape from Iran, was a member of the Mojhadin (opposed to the Khomeini regime); he used his passport to help a cousin escape from Iran, his family is regarded as opposed to the Islamic revolution in Iran, his brother was opposed to the regime in Iran, participated in student demonstrations, lost two fingers, applied for and received Political Asylum in Canada; he (Respondent) applied for Political Asylum in Canada and came to the United States and his application is considered abandoned; he came to the United States to visit his brother and parents who were coming to the United States; he is a landed immigrant in Canada. Attached to the Respondent's Asylum application are affidavits of the Respondent's father, brother and a cousin all indicating that the Respondent would be persecuted if he returned to Iran because he helped a relative leave Iran and that the authorities in Iran were looking for the Respondent by making inquiries to family members of his whereabouts.

A Motion to Reopen will not be granted unless it states new and material facts and is supported by evidentiary material. 8 C.F.R. Section 242.22; *Immigration and Naturalization Service v. Wang,* 450 U.S. 139 a prima facie case of eligibility for the relief sought must be established before a motion will be granted. *Matter of Martinez-Romero,* 18 I&N decision 75 a Motion to

Reopen must establish a prima facie case for reopening and that the grounds for discretionary relief will be granted as a matter of discretion.

To be eligible for asylum under Section 208 of the Act, the Respondent must meet the definition of a "refugee", which requires him to show persecution in a particular country on account of race, religion, nationality, membership in a particular social group or political opinion. The burden of proof required to establish eligibility for asylum is based on a reasonable person in like circumstances who would fear persecution for one of the five grounds specified above.

To be eligible for Withholding of Deportation pursuant to Section 243(h) of the Immigration and Nationality Act, the Respondent must show by a "clear probability" that his life or freedom will be threatened if deported to Iran on account of his race, religion, nationality, membership in a particular social group or political opinion. *Immigration and Naturalization Service v. Stevic,* 467 U.S. 407.

A review of the Respondent's Motion to Reopen and the supporting documentation submitted, namely, the Political Asylum application and affidavits in support thereof are insufficient to support reopening of the Respondent's deportation proceedings. Assuming what is stated in the Respondent's application, in that, he helped a cousin leave Iran, of itself, does not mean that the Respondent will be presecuted if he were to return to Iran. There is no evidence in the record that the Respondent's aiding his cousin to leave Iran is known to the authorities in Iran. There is no evidence in the record that the Respondent has engaged in activities in Iran which, if he

were to return to that country, would subject him to persecution. The fact that the Respondent's brother in Canada applied for and received asylum does not mean that the Respondent, if he were to return to Iran, would be persecuted.

The record in this case reflects that the Respondent's deportation proceedings should not be reopened in order for him to apply for Voluntary Departure in lieu of deportation. There is no indication that the Respondent, if granted Voluntary Departure, would leave the United States. The Respondent is married to a United States citizen and presumably will not leave the United States and be separated from his United States citizen spouse. I do not believe, based on the record, that the Respondent, if he were to be accorded a Voluntary Departure, would leave the United States within the time indicated. Consequently, the Motion to Reopen for him to apply for and receive Voluntary Departure will be denied.

Based on the foregoing and what is contained in the record, the Respondent's Motion to Reopen will be denied as a matter of discretion based on the fact that the Respondent has not established that reopening is warranted in that he has not established eligibility for the relief requested and that it would be granted as a matter of discretion.

Order: it is ordered that the Respondent's Motion to Reopen be and the same is hereby denied.

/s/ THOMAS M. RAGNO
Thomas M. Ragno
Immigration Judge

March 1, 1988

APPENDIX IV

UNITED STATES DEPARTMENT OF JUSTICE
Executive Office For Immigration Review
Office of the Immigration Judge
Boston, Massachusetts

FILE: 27685673

IN DEPORTATION PROCEEDINGS

In the Matter of:

HAMID ARZANIPOUR,
Respondent

CHARGE: Section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(2): Entered Without Inspection

ON BEHALF OF RESPONDENT:

Pro Se

ON BEHALF OF SERVICE:

MICHAELANGELO ROCCO, ESQ.
General Attorney, INS
Buffalo, N.Y.

DECISION OF THE IMMIGRATION JUDGE

It is charged in the Order to Show Cause that the Respondent is a native and citizen of Iran who entered the United States on or about 8-24-86 and is deportable under § 241(a)(2) of the Act. The Order to Show Cause was served upon the Respondent. This Order to Show

Cause contained a warning that a failure to attend the hearing at the time and place designated may result in the determination by the Immigration Judge in the Respondent's absence. The Respondent was duly notified of the date and place of the hearing, but without just cause failed to appear.

Section 242(b) of the Immigration and Nationality Act, 8 U.S.C. 1252(b), provides *inter alia* that the Immigration Judge shall have the power to conduct in abstentia hearings: "If any alien has been given a reasonable opportunity to be present at a proceeding under this section, and without reasonable cause fails or refuses to attend . . . the special inquiry officer [Immigration Judge] may proceed to a determination in like manner as if the alien were present." The Supreme Court, in *INS v. Lopez-Mendoza,* 104 S. Ct. 3479 (1984), stated: "The Respondent must be given a reasonable opportunity to be present at the proceedings, but if the Respondent fails to avail himself of the opportunity, the hearing may proceed in his absence." *See also Matter of Charles,* 16 I&N Dec. 241 (BIA 1977); *Matter of Marallag,* 13 I&N Dec. 775 (BIA 1971).

Since Respondent failed to appear or show any reason for such failure to appear, deportation proceedings were held in abstentia. The Immigration and Naturalization Service presented a Form I-213, Record of Deportable Alien, as evidence that the Respondent is a native and citizen of the country in the Order to Show Cause. I find that deportability has been established by evidence which is clear, unequivocal, and convincing. *Woodby v. INS,* 385 U.S. 276 (1966); 8 C.F.R. § 242.14(a).

Respondent was not present to make a request or establish eligibility for discretionary relief and therefore, will be ordered deported to the country of his/her citizenship.

ORDER: IT IS ORDERED that Respondent be deported from the United States to Iran on the charge contained in the Order to Show Cause.

/s/ THOMAS M. RAGNO
Thomas M. Ragno
Immigration Judge

JFK Fed. Bld.
Room E 431
Boston, MA 02203

Judg. of the

Sandra Ortiz

APPENDIX V

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-4565

HAMID ARZANIPOUR,
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

Petition for Review of an Order of the
Immigration and Naturalization Service

ON PETITION FOR REHEARING

(MARCH 7, 1989)

Before GEE, WILLIAMS and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ THOMAS GIBBS GEE
United States Circuit Judge

APPENDIX VI

UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 88-4565
Summary Calendar

INS No. A27-685-673

HAMID ARZANIPOUR,
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

Petition for Review of an Order of the
Immigration and Naturalization Service

(Filed January 25, 1989)

Before GEE, WILLIAMS, and HIGGINBOTHAM, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petition of Hamid Arzanipour for review of an order of the Board of Immigration Appeals, and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the Board of Immigration Appeals in this cause is affirmed.

IT IS FURTHER ORDERED that petitioner pay to respondent the costs on appeal, to be taxed by the Clerk of this Court.

January 25, 1989

ISSUED AS MANDATE: MARCH 17, 1989

APPENDIX VII

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-4565

HAMID ARZANIPOUR,
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

Petition for Review of an Order of the
Immigration and Naturalization Service

(Filed April 24, 1989)

ORDER

The motion of Petitioner for recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

/s/ THOMAS GIBBS GEE
United States Circuit Judge

APPENDIX VIII

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CIVIL ACTION NO. 88-4565

HAMID ARZANIPOUR,
Petitioner

v.

UNITED STATES IMMIGRATION &
NATURALIZATION SERVICE,
Respondent

(Filed February 10, 1989)

PETITIONER'S MOTION FOR RE-HEARING
BEFORE THE PANEL

COMES NOW the Petitioner in the above styled case and files this his Motion for Re-hearing before the Panel.

I.

This is a Motion to Re-hear the decision of the panel dated January 25, 1989.

The decision recited two alleged notices that counsel for the government has alleged were sent to the Petitioner. The Petitioner maintains he never received the notices

and thus did not appear at a deportation hearing. He was ordered deported *in absentia* as a result and was subsequently arrested and held in custody for 14 months. This order triggered the Petition for Review which this Honorable Court has considered.

In its decision, this Honorable Court has recited these alleged notices. There is no evidence in the record that the alleged notices were sent. There is not even a copy of the alleged second notice. The Court is required to review this matter only on the Administrative Record. 8 U.S.C. 1105a(a)(4). Therefore, it is improper to recite in the decision that these notices were sent or to imply that the Petitioner received them.

II.

The wording of the decision implies that counsel for the Petitioner did not file a brief to support the appeal of the Immigration Judge's decision of March 1, 1988. The brief was filed with the notice of appeal (form I-290A).

III.

The decision of the Court at p. 7 implies that extensions of the time for filing of appeals may be had. There is no provisions for extension of the filing time. This underscores the importance of a notice of appeal rights which includes the place to appeal and the time constraints upon the appeal. The time constraints are also very narrow (10 days from the date of the decision or 13 days if the decision is mailed). If the appeal was not filed timely in this case, it was because of a loss in time in ascertaining through research what the immigration

judge should have informed counsel and Mr. Arzanipour pursuant to his decision.

A factual determination as to whether the appeal was, in fact, untimely has not been made by this court.

IV.

The decision of this Honorable Court reflects that it declined to review the decision of the Immigration Judge either when he presumed that the notice of the hearing had been received by the Petitioner and ordered him deported *in absentia* on August 10, 1987 or when he declined to re-open the hearing on March 1, 1988. This Honorable Court also apparently declined to review the issue of the lack of adequate notice of the hearing which is required by statute. 8 USC 1252(b)(1).

This then raises the question as to whether the misconduct of the immigration judge in failing to notify counsel or Mr. Arzanipour of his right to appeal, including the time limits and place for appeal, has effectively cut-off judicial review of the immigration judge's decisions and actions.

While it is true that no statute specifically requires that a person in deportation hearings be given notice of appeal; the highest law of the land does not require that he be given Due Process of Law. United States Constitution, 5th Amendment.

In the case of *United States v. Jose Mendoza-Lopez and Angel Landeros-Quinones,* 481 U.S. ____, 95 L.Ed. 772 (1987), the Supreme Court recognized that waivers of rights to appeal must be "considered and intelligent" and that if fundamental defects in a deportation hearing

render judicial review of the immigration judge's decision unavilable, then there is a violation of due process of law.

Jose Mendoza-Lopez and Angel Landeros-Quinones were Mexican nationals who were arrested by INS and ordered deported at a hearing during which their rights to apply for suspension of deportation and to appeal the decision of the immigration judge were not fully explained to them. They were ordered deported and were deported. Thereafter, they were again arrested in the United States and were prosecuted criminally under 8 USC 1326 which makes illegal re-entry into the United States after deportation a felony.

Mr. Mendoza-Lopez and Mr. Angel Landeros-Quinones attacked the validity of the original deportation order in this collateral proceeding. The Supreme Court found that Congress did not intend for the vadility of the deportation order to be collaterally attacked in a 1326 proceeding. Notwithstanding this finding, the Supreme Court found that the Due Process rights of these two persons were violated. Thus, the Supreme Court found that Due Process rights require the protection of the Court even when the statutes involved seem to say otherwise. That is the situation in this case. The statutes do not specifically require the immigration judge to inform the individual of his appeal rights, but the Constitution does require this to safeguard the individual's Due Process rights, particularly given the narrow time within which an appeal can be taken and the lack of any means to extend the time.

Of course, that case took place within the context of a criminal prosecution which we do not have here. But what we do have here is a case of a man who was not

afforded a reasonable opportunity to appear at his deportation hearing as required by law and who was not advised of his right to appeal a Motion to Re-open in violation of the regulations of the INS and of Due Process. His right to judicial review of the immigration judge's decisions and conduct may have thus been cut-off. If this Honorable Court rules favorably for Petitioner, it will mean that his appeal will be heard by the Board of Immigration Appeals. Otherwise, Judicial Review may be foreclosed.

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that this case be reheard by the panel.

Respectfully submitted,

PRAPPAS & DARLOW, P.C.
Attorney for the Petitioner

By: /s/ GEORGE J. PRAPPAS
George J. Prappas
Attorney at Law
Lead Counsel
3120 Southwest Freeway
Suite 412
Houston, Texas 77098
(713) 526-3439
Texas Bar No. 16230000
Federal Bar No. 8505

CERTIFICATE OF SERVICE

This is to certify that 2 true copies of the foregoing "Petitioner's Motion for Re-hearing Before the Panel" was served on the following parties by U.S. Mail, certified, return receipt requested, postage pre-paid:

Richard M. Evans
Alice M. Smith
Office of Immigration Litigation
Civil Division
U.S. Department of Justice
P.O. Box 878
Ben Franklin Station
Washington, D.C. 20044

Mailed on the 6th day of February, 1989.

PRAPPAS & DARLOW, P.C.
Attorney for the Petitioner

By: /s/ GEORGE J. PRAPPAS
George J. Prappas
Attorney at Law
Lead Counsel

APPENDIX IX

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Office of the Clerk

February 13, 1989

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 88-4565 — Hamid Arzanipour -vs.- INS

INS# A27-685-673

The following action has been taken in the above case:

Motion of Petitioner to file Rehearing out of time is GRANTED.

GILBERT F. GANUCHEAU, Clerk

By: /s/ KAREN L. COMEAUX
Deputy Clerk

cc: Mr. George J. Prappas
Ms. Alice M. Smith

APPENDIX X

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

ORDER TO SHOW CAUSE and
NOTICE OF HEARING

In Deportation Proceedings under Section 242 of the Immigration and Nationality Act

File No. A27 685 673

UNITED STATES OF AMERICA:

In the Matter of

Hamid ARZANIPOUR, Respondent.
9626 Dorita St.
Houston, Texas 77038

UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;
2. You are a native of Iran
and a citizen of Iran,
3. You entered the United States at Alburg Springs, Vermont on or about 08/24/86;
4. You were not then inspected by an Immigration Officer.

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

> Section 241(a)(2) of the Immigration and Nationality Act, in that, you entered the United States without inspection.

WHEREFORE, YOU ARE ORDERED to appear for hearing before an Immigration Judge of the Immigration and Naturalization Service of the United States Department of Justice at a time and place to be set on _____ at _____m, and show cause why you should not be deported from the United States on the charge(s) set forth above.

Dated: 08/24/86 @ 0505

/s/ THOMAS A. MATECKI
for/MRH
Acting District Director
Buffalo, New York

NOTICE TO RESPONDENT

ANY STATEMENT YOU MAKE MAY BE USED AGAINST YOU IN DEPORTATION PROCEEDINGS

THE COPY OF THIS ORDER SERVED UPON YOU IS EVIDENCE OF YOUR ALIEN REGISTRATION WHILE YOU ARE UNDER DEPORTATION PROCEEDINGS. THE LAW REQUIRES THAT IT BE CARRIED WITH YOU AT ALL TIMES

If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Immigration and Naturalization Service. You should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you should bring the original and certified translation thereof. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Order to Show Cause and that you are deportable on the charges set forth therein. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the Government. Failure to attend the hearing at the time and place designated hereon may result in a determination being made by the Immigration Judge in your absence.

You will be advised by the Immigration Judge, before whom you appear, of any relief from deportation, including the privilege of departing voluntarily, for which you may appear eligible. You will be given a reasonable opportunity to make any such application to the Immigration Judge.

Failure to attend the hearing at the time and place designated hereon may result in your arrest and detention by the Immigration and Naturalization Service.

REQUEST FOR PROMPT HEARING

To expedite determination of my case, I request an immediate hearing, and waive any right I may have to more extended notice.

_____
(signature of respondent)

_____
(date)

Before:

_____
(signature and title of witnessing officer)

CERTIFICATE OF SERVICE

This order and notice were served by me on 8/24/86 in the following manner:

Personal Service

/s/ MARK R. HENRY BPA
(signature and title of employer or officer)

ALIEN'S COPY

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
68 Court St.
Buffalo, N.Y.

File No. A27 685 673

Date: 08/24/86

Mr. Hamid ARZANIPOUR
9626 Dorita St.
Houston, Texas

Pursuant to the authority of Part 242.2, Title 8, Code of Federal Regulations, the undersigned officer has determined that pending a final determination of deportability in your case, and, in the event you are ordered deported, until your departure from the United States is effected, but not to exceed six months from the date of the final order of deportation under administrative processes, or from the date of the final order of the court, if judicial review is had, you shall be:

Released from custody on your own recognizance.

You may request a redetermination of this decision before an Immigration Judge. If you wish to do so, you should check the block below, sign and return copy to the undersigned. If you do not wish to seek a redetermination of this decision do not sign or return your copy of this form.

The requesting of such redetermination will not disturb the custody or stay administrative proceedings or deportation in your case pending a decision by the Immigration Judge.

Very truly yours,

/s/ BENEDICT PENN
District Director
Buffalo, N.Y.

Signed _____

Date _____

APPENDIX XI

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA 22041

IN DEPORTATION PROCEEDINGS

IN THE MATTER OF:

ARZANIPOUR, HAMID
RESPONDENT

FILE: A27 685 673

GOVERNMENT'S BRIEF IN SUPPORT OF THE DECISION OF THE IMMIGRATION JUDGE

Jimmie L. Benton
Trial Attorney
Immigration and Naturalization Service
Litigation and Legal Advice Staff
509 North Belt
Houston, Texas 77060

GOVERNMENT'S BRIEF IN SUPPORT OF THE DECISION OF THE IMMIGRATION JUDGE

On August 10, 1987 the respondent failed to appear for his deportation hearing. The Immigration Court held an in absentia hearing ordering that the respondent be deported from the United States on the charge contained in the Order to Show Cause. From this decision, the respondent has appealed. It is the position of the Service that the decision of the Immigration Judge in this matter was correct and proper and that respondent's appeal must be dismissed.

In this case, the Immigration Court advised the respondent of the date, time, and place of his deportation hearing. The respondent failed to appear neither providing the Court any reason or explanation for having ignored the notice.

At the time of the hearing, and upon Court inquiry, the Government moved that an in absentia hearing be held. The Court, having been satisfied that respondent had been provided with a reasonable opportunity to appear and failed to do so, granted the Government's motion.

Based upon the evidence presented in the hearing by the Service and contained in the record of this proceeding, the Court found that the charge of deportability had been sustained by evidence that was clear, convincing and unequivocal. Due to respondent's absence, the Court was unable to question the respondent as to his choice of country of deportation as provided by Section 243(a) of the Immigration and Nationality Act. Consequently, the Court directed the respondent's deportation be to Iran.

Due to his absence, respondent necessarily failed to apply for any relief from deportation. Any prior representations made by the respondent as evidencing an intention to apply for such relief were properly deemed abandoned in light of respondent's failure to appear or at the very minimum, maintain contact with the Court regarding an intention to complete the application. In his absence, respondent failed to sustain his burden of establishing statutory eligibility for any relief from deportation. Accordingly, the Court issued a final order of deportation.

Respondent appealed the decision of the Immigration Judge. He now requests the Board of Immigration Appeals reverse this decision. The issue now before the Board is whether the final determination of the Immigration Judge in this deportation matter was correct and proper.

In absentia hearings are authorized under Section 242(b) of the Immigration and Nationality Act. 8 C.F.R. 242.8 gives authority to the Immigration Judge to determine deportability and to make decisions, including orders of deportation at the hearings under Section 242 (b) of the Act. Since this respondent failed to appear despite being given reasonable opportunity to be present, an in absentia hearing was held. The respondent was found deportable and ordered deported. There are no viable issues raised on appeal. There is no legal basis to reverse the decision of the Immigration Judge.

Given the posture of the record, a final determination of the Immigration Judge was required and proper under the law and regulations that control the efficient disposition of deportation matters. The Government is convinced of the propriety and necessity of finishing this

action at this level in this matter. Any mandated further action in contemplation of potential appearances by the respondent on issues of discretionary relief would be senseless and improper. The respondent had been given ample opportunity to appear and present his case. The Immigration Judge was extremely careful to ascertain clearly on the record that respondent had proper notice of the time, date, and place of hearing. At that juncture, it becomes the duty of the respondent to formulate and prepare matters for timely presentation to the Court.

This respondent should not be able to gain a benefit over others in a like situation who appear as required. Accordingly, it is moved that this appeal be dismissed and the decision of the Immigration Judge be affirmed a final.

/s/ JIMMIE L. BENTON
Jimmie L. Benton
Trial Attorney
Houston, Texas

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of July, 1988, a true and correct copy of the foregoing was mailed to respondent's attorney:

George J. Prappas
3120 SW Freeway, Suite 412
Houston, Texas 77098

/s/ JIMMIE L. BENTON
Jimmie L. Benton
Trial Attorney
Houston, Texas

APPENDIX XII

NOTICE OF APPEAL TO THE BOARD OF IMMIGRATION APPEALS

File No. A27 685 673

In the Matter of:

ARZANIPOUR, Hamid

1. I hereby appeal to the Board of Immigration Appeals from the decision, dated March 1, 1988 in the above entitled case.

2. Briefly, state reasons for this appeal.

1) Motion to re-open should have been granted since it states new and material facts, supported by evidentiary material, and presents a prima-facie case for the granting of discretionary relief;

2) The alien has never been accorded a fair hearing as required by 8 USCS, section 1252(b)(1). The statement on the part of the government that notices were mailed does not mean they were received.

3) The alien has an "Employment and Immigration" card from Canada. There is no reason to presume that he would not voluntarily depart to Canada were he granted such discretionary relief.

4) The alien has not had the opportunity to designate the country to which he should be deported in accordance with 8 USCS, section 1253(a).

5) The alien has been denied procedural due process as guaranteed to him by the U.S. Constitution (5th amendment) and by 8 USCS, section 1252;

6) The Immigration Judge abused his discretion in denying the Motion to Re-Open.

3. I do desire oral argument before the Board of Immigration Appeals in Washington, D.C.

4. I am filing a separate written brief or statement.

/s/ GEORGE J. PRAPPAS
Signature of Appellant
(or attorney or representative)

George J. Prappas, Attorney
(Print or type name)

3120 Southwest Freeway,
Suite 412
Houston, Texas 77098
Address (Number, Street,
City, State, Zip Code)

March 22, 1988
Date

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION & NATURALIZATION SERVICE

IN DEPORTATION PROCEEDINGS

IN THE MATTER OF

HAMID ARZANIPOUR,
RESPONDENT

FILE #A27 685 673

BRIEF IN SUPPORT OF APPEAL ON DECISION OF IMMIGRATION JUDGE DENYING MOTION TO RE-OPEN

TO: THE BOARD OF IMMIGRATION APPEALS, Washington, D.C.

NOW COMES HAMID ARZANIPOUR, the Respondent herein, and files this, his Brief in Support of Appeal of Decision of Immigration Judge Denying Motion to Re-open, by and through the undersigned, his attorney of record.

I.

As the Immigration Judge stated in his decision, "A Motion to Reopen will not be granted unless it states new and material facts and is supported by evidentiary material . . . A prima facie case of eligibility for the relief sought must be established before a motion will be granted." *Decision of Immigration Judge,* March 1, 1988, at p. 5.

"A prima facie case is established when an alien presents "affidavits or other evidentiary material," 8 CFR 103.5, which, if true, would satisfy the requirements for substantive relief, *Abudu v. I.N.S.*, 802 F.2d 1096 at 1100 (9 Cir. 1986).

The evidence must be "new" in the sense that it was "not available and could not have been discovered at the former hearing", 8 CFR 3.2. May I remind the Board that there was no "former hearing"; so, all of the evidence submitted with the Motion to Re-Open was new and had not been considered when the court ruled that the alien was deportable *in absentia.* The evidence was considerable and consisted of the following: 1) Request for asylum in the United States; 2) Four affidavits of family members bearing on the persecution that the family has been subjected to by the Iranian government; 3) copies of the respondent's Canadian immigration and employment card and his Candian driver's license; 4) a copy of the I-130 filed by the respondent's wife at Houston INS. All of this evidence was new and material to his eligibility for asylum, section 243(h) relief, adjustment of status, voluntary departure, setting of a bond, and other matters that might arise at a fair hearing.

The Respondent establishes that he, at least, has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The test for refugee status includes both a subjective and an objective component. *Bolanos-Hernandez,* 767 F.2d at 1277, 1283 & n.11 (9th Cir. 1984). The subjective test is satisfied if the fear is genuine. The determination as to the genuineness of the Respondent's fears is best tested at a hearing during which he would be subjected to cross-examination.

The objective test is satisfied if persecution is, in fact, a reasonable possibility. See *Bolanos-Hernandez,* 767 F.2d at 1282-83 (9th Cir. 1984). The Respondent has submitted sworn affidavits from family members attesting to the persecution that the Arzanipour family has generally been subjected to by the Iranian government. Also, there is the sworn statement of the Respondent that he helped a cousin escape from Iran. The Respondent also escaped from Iran without the required exit permit. The Respondent states that he was a member of the Mojhadin (opposed to the Khomeini regime). His brother was opposed to the regime in Iran (as is the Respondent) and participated in student demonstrations. He lost 2 fingers due to wounds inflicted upon him. He has been granted political asylum in Canada.

For the purpose of screening Motions To Re-Open, all reasonable inferences must be drawn in favor of the movant unless the evidence presented is "inherently unbelievable." *Hernandez-Ortiz,* 777 F.2d at 514.

Therefore, all reasonable inferences should be drawn from Respondent's Motion to Re-Open and the accompanying "Request for Asylum" and supporting affidavits and other documents and the Motion should have been granted on this ground alone.

Further, the Respondent can make a case at hearing that he is likely to comply with an order to voluntarily depart the United States. The Immigration Judge's conclusion that the Respondent would not comply with such an order simply because he is married to a U.S. citizen is arbitrary and capricious and flies in the face of the facts in the case. The Respondent is in possession of a Canadian "Employment and Immigration" card and

has friends and relatives in Canada. He also has applied for asylum in Canada where his brother was granted asylum and now resides. The Respondent's wife is a U.S. citizen and is free to travel to Canada on visits without a visa. She has filed an I-130 petition with the U.S. INS office in Houston. Presumably, it will be approved and the Respondent will be eligible for permanent residence status in the United States. Why would he place himself in peril by violating a voluntary departure order from the court?

Thus, the Respondent has established a prima facie case that he is eligible for discretionary relief in the form of voluntary departure if he is granted a hearing.

II.

The Respondent never received notice of either of the 2 hearings scheduled. The statement of the government that the notices were mailed does not mean that the notices were received. Indeed, the record reflects that the Respondent and his brother moved from the address that the notices were sent to prior to the sending of the notices. The record reflects also that the U.S. Postal Service was notified of the new addresses and that the USINS received notice of the new address of the Respondent when the I-130 petition was filed.

Notice is an integral of Due Process as required by the U.S. Constitution, Amendment 5, and the Administrative Procedures Law (5 USCS 551 et. seq.).

The Immigration Judge erroneously presumed that the Respondent had notice simply because the government said that 2 notices had been sent. If this were to be held

as sufficient, then there would, in essence, be no notice requirement. The ambiguity in this case and any similar cases can be easily cured, administratively, by simply sending the notice by certified mail, return receipt requested as is commonly done in matters pending before any court. Having failed to take this simple step, the government is at fault and cannot show that the Respondent received notice of the hearing. Even in cases where notice of a hearing was received, it has been held that that result of the proceedings be vacated if the notice was less than the 7 days provided by 8 CFR 242.1. *In Re Samai* (1980, BD Imm App) I&N Interim Dec. No. 2756.

Notice is such an important part of procedural due process that it cannot be presumed as the Immigration Judge sought to do.

III.

8 USCS 1253(a) states:

> "The deportation of an alien in the United States provided for in this Act, or any Act or treaty, shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, in his discretion, concludes that deportation to such a country would be prejudicial to the interest of the United States."

The same section further provides that the alien may be deported to a foreign contiguous territory if he had a residence in such territory. There is no question that the Respondent had a residence in Canada where he

lived for approximately 1 year and applied for asylum and was granted work authorization.

But, the Respondent was never given an opportunity to designate the country to which he wished to be deported. He was ordered deported to Iran, *in absentia*.

IV.

The Respondent has substantial equities in his case in that he is married to a U.S. citizen and will thus be entitled to permanent residence status upon the expected favorable adjudication of the I-130 petition and the compliance with the Marriage Fraud Act. He has never received a hearing on his case, having not received the notices that the government says they sent. It would surely shock the conscience of Justice to deport a man with such equities without a hearing.

We are merely asking for a hearing—an opportunity to present our case. Will we be denied that fundamental due process right.

WHEREFORE, PREMISES CONSIDERED, Respondent Hamid ARZANIPOUR, by and through his attorney of record prays that the Board of Immigration Appeals will reverse the decision of the Immigration Judge denying the Motion to Re-Open and order that the proceedings in this case be re-opened and a hearing held on the merits.

Respondent further prays for a Stay of Deportation pending the outcome of this Appeal.

Respectfully submitted,

PRAPPAS & DARLOW, P.C.

/s/ GEORGE J. PRAPPAS
George J. Prappas
3120 Southwest Freeway
Suite 412
Houston, Texas 77098
(713) 526-3439
TBC 16230000

APPENDIX XIII

UNITED STATES DEPARTMENT OF JUSTICE
Executive Office For Immigration Review
Office Of The Immigration Judge
Buffalo, New York

ARZANIPOUR, HAMID

U.S. INS

HOUSTON TX 10000

Date: 06/09/88

File A27-685-673

In the Matter of:

ARZANIPOUR, HAMID

Enclosed is a transcript of the testimony of record.

You are granted until 6/27/88 to submit a brief to this office in support of your appeal.

Opposing counsel is granted until 7/11/88 to submit a brief in opposition to the appeal.

All papers filed with the Court shall be accompanied by proof of service upon opposing counsel.

Sincerely,

/s/ STAR BETH PACITTO
Immigration Court Clerk

cc: MICHAEL A. ROCCO

APPENDIX XIV

U.S. DEPARTMENT OF JUSTICE
Executive Office For Immigration Review
Office Of The Immigration Judge

Date: July 1, 1987

File #: A27 685 673

IN THE MATTER OF:

Hamid Arzanipour

IN DEPORTATION PROCEEDINGS

NOTICE OF HEARING

TO: Hamid Arzanipour
9626 Dorita Street
Houston, TX 77038

Please take notice that the above captioned case will be heard by an Immigration Judge on August 10, 1987 at 3:30 p.m. at the Office of the Immigration Judge, GSA Conference Room 914, Federal Building, 111 West Huton Street, Buffalo, NY 14202.

Office of the Immigration Judge

By: /s/ ELLEN GLASSNER
Clerk